



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BY ELECTRONIC MAIL

August 18, 2021

Lawrence H. Norton, Esq.
Venable LLP
600 Massachusetts Ave., NW
Washington, DC 20001
lhnorton@venable.com

RE: MUR 7812
Agence France-Presse

Dear Mr. Norton:

On October 14, 2020, the Federal Election Commission notified your client of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On August 10, 2021, the Commission found, on the basis of the information in the complaint, and information provided by your client, that there is no reason to believe your client violated 52 U.S.C. § 30121 by making prohibited foreign national contributions. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Nick Mueller, the attorney assigned to this matter, at (202) 694-1577 or nmueller@fec.gov.

Sincerely,

A handwritten signature in blue ink that reads "Claudio Pavia".

Claudio J. Pavia
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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6 **RESPONDENTS:** Facebook, Inc. **MURs: 7812, 7825, 7869**
7 Biden for President and Andrea Wise
8 in her official capacity as treasurer
9 Agence France-Presse¹
10

11 **I. INTRODUCTION**

12 These matters were generated by Complaints filed with the Federal Election Commission
13 alleging that Facebook, Inc. (“Facebook”) violated the Federal Election Campaign Act of 1971,
14 as amended (the “Act”), by fact-checking and reducing the distribution of posts by users on its
15 platform linking to articles critical of 2020 presidential candidate Joseph Biden and vice-
16 presidential candidate Kamala Harris. The Complaints specifically allege that Facebook labeled
17 several posts with links to articles critical of Harris as “False Information” or “False News” and
18 provided alternative links to articles published by Facebook’s fact-checking partners explaining
19 why the original articles were deemed false.² The Complaints also allege that Facebook reduced
20 the distribution of articles that were critical of Biden, specifically pointing to an article in the
21 *New York Post* relating to allegations of illegal activity by Biden’s son, Hunter Biden.³

22 The Complaints allege that, in posting these fact-checking articles and allegedly reducing
23 the distribution of certain news stories, Facebook made excessive and prohibited in-kind
24 corporate contributions to Biden for President and Andrea Wise in her official capacity as

¹ Biden for President is a Respondent only in MURs 7812 and 7869, and Agence France-Presse is a Respondent only in MUR 7812.

² MUR 7825 Compl. at 3-4 (Oct. 21, 2020); MUR 7812 Compl. at 12-13 (Oct. 6, 2020).

³ MUR 7825 Compl. at 4, 6; MUR 7869 Compl. at 1-2 (Jan. 12, 2021).

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treasurer (the “Biden Committee”)⁴ or, in the alternative, that Facebook made independent expenditures in support of Biden, without providing required disclaimers or reporting the independent expenditures to the Commission.⁵ The Complaints in MURs 7812 and 7869 also allege that the Biden Committee violated the Act by knowingly accepting the excessive and prohibited in-kind corporate contributions from Facebook.⁶ Finally, the Complaint in MUR 7812 alleges that Agence France-Presse (“AFP”), a foreign media outlet and fact-checking partner of Facebook, made prohibited in-kind foreign national contributions to the Biden Committee.⁷

Respondents deny the allegations. Facebook asserts that its actions were part of its “broader, well-publicized effort to combat misinformation on its platform for independent business reasons,” and were not undertaken “for the purpose of influencing any election for Federal office.”⁸ In addition, Facebook asserts that there is no evidence of coordination between Facebook and any candidate,⁹ and it argues that the fact-checking articles at issue were not “independent expenditures” because they did not include express advocacy.¹⁰ The Biden Committee similarly asserts that the Complaints fail to provide any facts that suggest that it

⁴ See MUR 7812 Compl. at 19-21; MUR 7825 Compl. at 5-6; MUR 7869 Compl. at 3. Though the Complaints in MURs 7812 and 7825 frame these contributions as to Harris, because Harris was the vice-presidential candidate running on the same ticket as presidential candidate Joe Biden, the entity receiving any alleged contribution would be the Biden for President committee.

⁵ MUR 7812 Compl. at 22; *see* MUR 7825 Compl. at 5.

⁶ MUR 7812 Compl. at 19-22; MUR 7869 Compl. at 3.

⁷ MUR 7812 Compl. at 22-23.

⁸ MUR 7812 Facebook Resp. at 2 (Nov. 24, 2020); MUR 7825 Facebook Resp. at 2 (Dec. 11, 2020); MUR 7869 Facebook Resp. at 1-2 (Mar. 1, 2021).

⁹ MUR 7812 Facebook Resp. at 5-7; MUR 7825 Facebook Resp. at 5-7.

¹⁰ MUR 7812 Facebook Resp. at 8; MUR 7825 Facebook Resp. at 8; MUR 7869 Facebook Resp. at 4-6.

1 coordinated with Facebook or AFP.¹¹ Finally, AFP responds noting the absence of evidence
2 suggesting AFP coordinated with any federal candidate, its general journalistic purposes and
3 asserting that, although it is a foreign corporation, its activities are covered by the Act's media
4 exemption and therefore are not contributions or expenditures.¹²

5 As explained below, based on the available information, Facebook's conduct does not
6 appear to constitute a contribution under the Act because Facebook has credibly explained that it
7 has a commercial, rather than electoral, motivation underlying the fact-checking program and
8 related activities at issue in these Complaints. Moreover, there is no basis to reasonably
9 conclude that Facebook or AFP coordinated with the Biden Committee. Further, the fact-
10 checking articles at issue do not satisfy the meaning of independent expenditure because they do
11 not expressly advocate for the election or defeat of any candidate. Finally, AFP's activities
12 appear to have been done for journalistic purposes rather than for the purpose of influencing an
13 election; in any event, these activities appear to be excluded from the definition of contribution
14 under the Act's media exemption.

15 Accordingly, the Commission finds no reason to believe that Facebook violated 52
16 U.S.C. §§ 30116(a), 30118(a) by making excessive or prohibited in-kind corporate contributions
17 or that Facebook violated 52 U.S.C. §§ 30104(c)(1), 30120(a) by failing to report or provide
18 required disclaimers on independent expenditures. Further, the Commission finds no reason to
19 believe that the Biden Committee violated 52 U.S.C. §§ 30116(f), 30118(a) by knowingly
20 accepting or receiving prohibited corporate or excessive contributions. Finally, the Commission

¹¹ MUR 7812 Biden Committee Resp. at 3 (Dec. 1, 2020); MUR 7869 Biden Committee Resp. at 4 (Mar. 1, 2021).

¹² MUR 7812 AFP Resp. at 4-6 (Dec. 10, 2020).

1 finds no reason to believe that AFP violated 52 U.S.C. § 30121 by making prohibited foreign
2 national contributions.

3 **II. FACTUAL BACKGROUND**

4 The Complaints identify three Facebook posts that were flagged by Facebook’s fact-
5 checking program as “False Information” or “False News,” and appended with articles written by
6 Facebook’s fact-checking partners. In addition, the Complaints point to Facebook’s actions to
7 limit the distribution of posts containing a link to a *New York Post* article that had been flagged
8 for fact-checking. Based on these actions, described below, the Complaints allege that Facebook
9 made in-kind contributions to the Biden Committee, and that AFP, the author of one of the fact-
10 checking posts, made a foreign national in-kind contribution.

11 The Complaint in MUR 7812 alleges that Facebook “censored and removed” posts
12 linking to an article by Cam Edwards, published on BearingArms.com, entitled “Kamala Harris
13 Doesn’t Think You Have The Right To Own A Gun” (“Edwards Article”).¹³ The Complaint
14 states that Facebook “visually and functionally superimposed” a fact-check article published by
15 AFP in its place, such that “while a user could see that the [original] article had been posted, it
16 was impossible to click on that article (or the original post) without being redirected to the AFP
17 Fact Check Article.”¹⁴ Below is an example provided by the Complaint depicting how this fact
18 check article allegedly appeared:¹⁵

¹³ MUR 7812 Compl. at 3, 13; *see* Cam Edwards, *Kamala Harris Doesn’t Think You Have the Right To Own a Gun*, BEARINGARMS.COM (Aug. 11, 2020), <https://web.archive.org/web/20200812141104/https://bearingarms.com/cam-e/2020/08/11/kamala-harris-right-to-own-a-gun/>.

¹⁴ MUR 7812 Compl. at 13; Ian Timberlake, *Kamala Harris Does Not Oppose Gun Ownership or the Second Amendment*, AFP FACT CHECK (Aug. 18, 2020), <https://factcheck.afp.com/kamala-harris-does-not-oppose-gun-ownership-or-second-amendment>.

¹⁵ MUR 7812 Compl. at 16; *id.*, Ex. 7 (image of “False Information” label as appended to the original Facebook post). This image is of the fact check of another post, described below, which the Complaint contends

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2 The Complaint states that the Edwards Article was “accurately stated and well-sourced” and that
3 AFP’s fact-check article was “deceptive and misleading.”¹⁶ The Complainant also states that he
4 posted his opinion of these articles in a private Facebook group, but that Facebook “deleted and
5 rendered inaccessible” his post shortly thereafter.¹⁷ The Complainant further states that he
6 posted a link to an *amicus* brief signed by Harris which supported his belief that the Edwards
7 Article was not false news and that this post was also “superimposed with the AFP Fact Check
8 Article.”¹⁸ The Complainant states that, in response, he emailed Facebook disputing these
9 decisions and that shortly afterward he was notified by Facebook that his account had been
10 disabled.¹⁹

was treated in the same manner. MUR 7812 Compl. at 16. Though the Complaint also attaches the image of the fact-check post regarding the Edwards Article, it was provided in a format which was so small as to be unreadable. *Id.*, Ex. 1.

¹⁶ MUR 7812 Compl. at 13.

¹⁷ *Id.* Based on the Complainant’s descriptions of Facebook’s actions, it is unclear whether the post disappeared entirely or was treated in the same fashion as the other posts that were fact-checked. *Id.* The Complainant states that he is a former Facebook employee and that group was made up of current and former employees. He states that current Facebook employees told him that they would “raise the issue internally.” *Id.*

¹⁸ *Id.* at 13-14. The Complaint does not provide an image of this post.

¹⁹ *Id.* at 14-15.

1 Similarly, the Complaint in MUR 7812 alleges that Facebook fact checked another article
 2 criticizing Harris, by Rachel Malone, published on HoustonCourant.com, entitled “Kamala
 3 Harris is the Gun Owner’s Worst Nightmare” (“Malone Article”).²⁰ Again, the article was also
 4 labeled “False Information” by Facebook and superimposed with an image linking to the same
 5 fact-checking article as shown above.²¹ The MUR 7812 Complaint also states that those sharing
 6 the Malone Article had the distribution of their posts limited by Facebook.²² According to the
 7 Complaint, after “much criticism for its removal of the Malone Article that article apparently
 8 was reviewed internally within Facebook, and the AFP Fact Check designation as ‘false news’
 9 was reversed.”²³ The Complaint states that Facebook also “restored” the distribution of posts
 10 from the users who had shared the article.²⁴

11 The Complainant in MUR 7825 states that on October 12, 2020, it posted an article,
 12 published on LifeNews.com, and entitled “Kamala Harris Tried to Put Pro-Lifers in Jail Who
 13 Exposed Planned Parenthood Selling Baby Parts” (“Liberty Counsel Article”) that was also fact
 14 checked by Facebook.²⁵ In a similar fashion as described above, Facebook labeled it “False

²⁰ *Id.* at 16; Rachel Malone, *Kamala Harris is the Gun Owner’s Worst Nightmare*, HOUSTON COURANT (Aug. 15, 2020), <https://www.houstoncourant.com/houston-voices/2020/kamala-harris-is-the-gun-owners-worst-nightmare>.

²¹ MUR 7812 Compl. at 16; *id.*, Ex. 7 (screenshot of “False Information” label as appended to the original Facebook post). The fact-checking article, while responding to some specific statements in the Edwards Article, also more broadly discussed Harris’s position on gun rights or gun control issues and thus had some bearing on the Malone Article.

²² MUR 7812 Compl. at 16-17; *see id.*, Ex. 6 (screenshot of message from Facebook regarding the reduction in distribution). In other words, their posts would be less likely to appear in the feeds of other users.

²³ *Id.* at 17.

²⁴ *Id.*

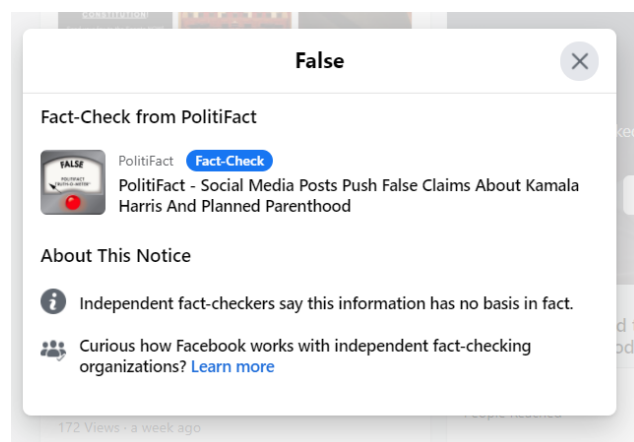
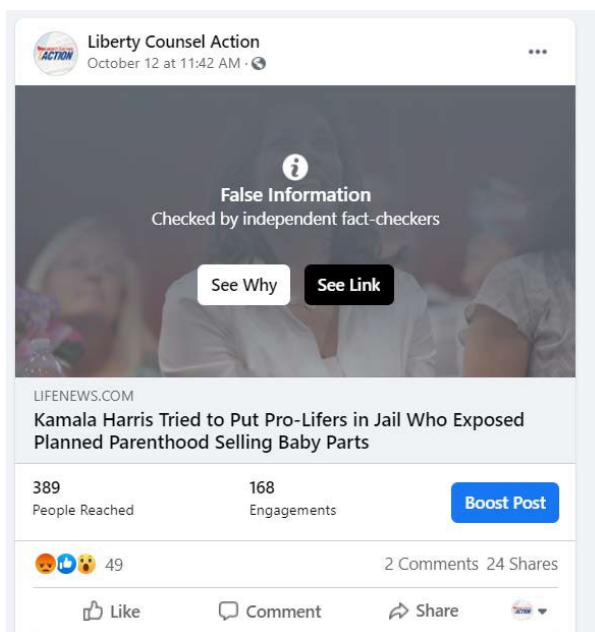
²⁵ MUR 7825 Compl. at 2; *see id.*, Ex A (image of Liberty Counsel Article); Liberty Counsel, *Kamala Harris Tried to Put Pro-Lifers in Jail Who Exposed Planned Parenthood Selling Baby Parts*, LIFE NEWS.COM, (Aug. 14, 2020), <https://www.lifenews.com/2020/08/14/kamala-harris-tried-to-put-pro-lifers-in-jail-who-exposed-planned-parenthood-selling-baby-parts/>.

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Information” and “Checked by independent fact-checkers” with two links labeled “See Why” and “See Link.”²⁶ The Complaint states that if a user clicked on the “See Why” label a window with the title “False” appeared with the title of and a link to an article by PolitiFact, another Facebook fact-checking partner, entitled “Social Media Push False Claims About Kamala Harris And Planned Parenthood.”²⁷



In addition to the three articles above that were the subject of Facebook fact-checking, the Complaints in MUR 7825 and MUR 7869 further allege that Facebook blocked or reduced the distribution of an article in the *New York Post* (“*New York Post* Article”) that contained allegations of impropriety regarding Hunter Biden, the son of then-presidential candidate Joe Biden.²⁸ As referenced by the Complaint in MUR 7825, Facebook tweeted a statement shortly

²⁶ MUR 7825 Compl. at 2, Ex. B (screenshot of “False Information” label as appended to the original Facebook post).

²⁷ *Id.* at 3, Ex. C (screenshot of window linking to PolitiFact article which popped up when a user clicked “See Why” on the above reference fact check post).

²⁸ MUR 7825 Compl. at 4 (alleging that the *New York Post* Article’s distribution was reduced); MUR 7869 Compl. at 1-2 (alleging that the *New York Post* Article was “block[ed]”); see Emma-Jo Morris and Gabrielle

1 after the *New York Post* Article was published announcing that it had deemed the article “eligible
 2 to be fact checked” and “[i]n the meantime, we are reducing its distribution on our platform.”²⁹
 3 Facebook described this as “part of our standard process to reduce the spread of
 4 misinformation . . . temporarily reduc[ing] distribution pending fact-checker review.”³⁰

5 The Complaints suggest that each of the activities by Facebook described above were
 6 made for the purpose of assisting the Biden Committee, evidenced by alleged bias exhibited by
 7 Facebook, its employees, and contractors. For instance, the MUR 7812 Complaint relies on the
 8 disparity in contributions made by Facebook employees to Democrats compared to Republicans,
 9 such that “it can reasonably be concluded” that the Facebook’s fact-checking program is “not
 10 intended to protect the public against ‘false news,’ but rather to ensure that the public is not
 11 exposed to information critical of the Democratic political candidates.”³¹ Similarly, without
 12 providing any specific support, the MUR 7869 Complaint alleges that Facebook’s blocking of
 13 the *New York Post* article was “not an isolated incident” and that Facebook selectively fact-
 14 checks “Conservative, Libertarian, Republican, and Pro-Trump sources and articles, while failing
 15 to do the same with Liberal and Democratic ones.”³² It also points to the website of a former

Fonrouge, *Smoking-gun Email Reveals How Hunter Biden Introduced Ukrainian Businessman to VP Dad*, N.Y. POST (Oct. 14, 2020), <https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad/>. The MUR 7825 Complaint also notes that the Facebook spokesperson who announced the decrease in the distribution of the *New York Post* Article was “reportedly a former staffer for Democratic PACs.” *Id.*

²⁹ MUR 7825 Compl. at 4. (citing “Facebook’s announcement of the censorship is at <https://twitter.com/andymstone/status/1316395902479872000>”); @andymstone, Comment to Twitter (Oct. 14, 2020 11:10 AM), <https://twitter.com/andymstone/status/1316395902479872000> (“While I will intentionally not link to the New York Post, I want be clear that this story is eligible to be fact checked by Facebook’s third-party fact checking partners. In the meantime, we are reducing its distribution on our platform.”).

³⁰ @andymstone, Comment to Twitter (Oct. 14, 2020 1:00 PM), <https://twitter.com/andymstone/status/1316423671314026496> (“This is part of our standard process to reduce the spread of misinformation. We temporarily reduce distribution pending fact-checker review.”).

³¹ MUR 7812 Compl. at 18.

³² MUR 7869 Compl. at 2. The Complaint also alleges, again without providing any specific support, that “Facebook exempts ‘Opinion’ articles and posts from Fact-checking” but withheld “the opinion designation from

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“content moderator” employed by Cognizant, a Facebook contractor apparently no longer associated with Facebook, who states that some of his co-workers were politically biased and may have moderated content in a biased manner.³³

Finally, the MUR 7869 Complaint alleges that Facebook coordinated its activities with the Biden Committee, specifically pointing to the Biden transition team’s hiring Jessica Hertz, Facebook’s former Associate General Counsel for Regulatory Affairs, as the transition team’s General Counsel.³⁴ The Biden Committee denies any coordination with Facebook.³⁵

In Response, Facebook states that it launched its third-party fact-checking program in December 2016 “to prevent the spread of viral misinformation and help users better understand what they see online”³⁶ because “[m]isinformation is bad for our community and bad for our business.”³⁷ It states that the program identifies potentially false material, via a “generally automated” process relying on “computer programs that make predictions about whether content may be misinformation based on a range of signals — *e.g.*, whether third-party comments on the

Conservative, Libertarian, Republican, and Pro-Trump sources and articles, while granting such designations to Liberal, Democratic, and Pro-Biden sources and articles.” *Id.*

³³ *Id.* at 2 n.1 (citing www.ryanhartwig.org). The MUR 7869 Complaint cites to the website of Ryan Hartwig, a former content moderator at Cognizant, a Facebook contractor. A video prominently featured on Hartwig’s website is a report created by Project Veritas. *See* Project Veritas, *Another Facebook Insider Details Political Censorship: Current HR Exec. ‘No one has the White Man’s Back’*, YOUTUBE, (Jun. 25, 2020), <https://www.youtube.com/watch?v=9O8p4zK8ywY>.

The video contains an interview with Hartwig interspersed with short clips from video he secretly recorded of conversations with his coworkers at Cognizant (not Facebook itself). These clips include co-workers making negative statements regarding Trump, as well as conservative co-workers echoing his sentiments of perceived bias.

³⁴ MUR 7869 Compl. at 2-3. The Complaint also notes that Hertz was formerly “principal deputy counsel to Joe Biden during his tenure as Vice-President.” *Id.*

³⁵ MUR 7812 Biden Committee Resp. at 3; MUR 7869 Biden Committee Resp. at 4.

³⁶ MUR 7812 Facebook Resp. at 3, 9.

³⁷ *Hard Questions: How Is Facebook’s Fact-Checking Program Working?*, FACEBOOK NEWSROOM (June 14, 2018), <https://newsroom.fb.com/news/2018/06/hard-questions-fact-checking/>.

1 post include phrases that indicate readers do not believe the content is true, whether Facebook
 2 users have flagged the content as being potentially false, and whether the post is being shared by
 3 a user or page that has spread false news before.”³⁸ Facebook puts the identified posts into a
 4 queue for fact-checking by their third-party fact-checking partners, who may also independently
 5 identify content for fact-checking.³⁹ Facebook asserts that it temporarily reduces the distribution
 6 of such posts while they are awaiting fact-checking, and, if ultimately deemed to contain false
 7 content, the post is labeled, showing the fact-check article and its distribution remains reduced.⁴⁰

8 Facebook’s third-party fact-checking partners include the Associated Press, Reuters, and
 9 *USA Today*, in addition to, as noted above, AFP and PolitiFact. Facebook states that these
 10 partners “are independent of Facebook and certified through the non-partisan International Fact-
 11 Checking Network (IFCN).”⁴¹

12 Facebook asserts that its fact-checking program applies not only to political subjects but
 13 also other subjects, such as false information relating to mask wearing and COVID-19, false
 14 stories about the cause of wildfires in California, Oregon, and Washington, and untrue stories
 15 about celebrities.⁴² Further, Facebook states that even among the fact-checking posts regarding
 16 political subjects, the posts “span the political spectrum.”⁴³ Facebook states that negative

³⁸ MUR 7812 Facebook Resp. at 3.

³⁹ *Id.*; MUR 7825 Facebook Resp. at 3.

⁴⁰ MUR 7812 Facebook Resp. at 3; MUR 7825 Facebook Resp. at 3.

⁴¹ MUR 7812 Facebook Resp. at 1, 3, n.1 (citing *Hard Questions: How Is Facebook’s Fact-Checking Program Working?*, FACEBOOK NEWSROOM (June 14, 2018), <https://newsroom.fb.com/news/2018/06/hard-questions-fact-checking/>); MUR 7825 Resp. at 1, 3, n.1 (same).

⁴² MUR 7812 Facebook Resp. at 3-4; MUR 7825 Facebook Resp. at 3-4; MUR 7869 Facebook Resp. at 7; *see also Facebook Community Standards*, <https://www.facebook.com/communitystandards/> (stating general rules for content Facebook may find objectionable and take action in response to).

⁴³ MUR 7812 Facebook Resp. at 3-4; MUR 7825 Facebook Resp. at 3-4; MUR 7869 Facebook Resp. at 7-8.

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articles about Republican candidates, including Trump, have also been fact-checked, deemed false, and thus subjected to reduction in distribution and labeling as false.⁴⁴

Regarding the Complainant in MUR 7812’s other allegations regarding his account being disabled, Facebook states that the Complaint “does not assert any alleged FECA violations based on these alleged occurrences.”⁴⁵ Facebook also points to its “well-publicized rules governing conduct on its platform” and that “it may take action against violations of its Community Standards in order to ensure the integrity of the user experience on its platform.”⁴⁶ Other than linking to its Community Standards, Facebook does not provide any further details confirming or denying the truth of these allegations or Facebook’s decision-making process underlying the disabling of accounts.

Finally, in response to the allegation that AFP’s fact-checking in partnership with Facebook constitutes a foreign national contribution to the Biden Committee, AFP, a French news wire agency,⁴⁷ explains that in addition to providing news stories, and political commentary, in 2017 it began AFP Fact Check, a blog consisting of regular posts “seek[ing] to help the public and newsrooms come to informed conclusions about information they find online, whether from social media posts, news articles, videos or statements.”⁴⁸ Though the AFP

⁴⁴ Such fact-checked articles include claims that Trump stated he will “take away your social security,” that “Senator Mitch McConnell is the richest senator while Kentucky is the poorest state,” and that Trump “bailed out Wall Street but not Main Street.” MUR 7812 Facebook Resp. at 4; MUR 7869 Facebook Resp. at 8.

⁴⁵ MUR 7812 Facebook Resp. at 2 n.3.

⁴⁶ *Id.* (citing *Facebook Community Standards*, <https://www.facebook.com/communitystandards/>).

⁴⁷ Encyclopedia Britannica Online, “Agence France-Presse (AFP),” <https://www.britannica.com/topic/Agence-France-Presse> (last checked Apr. 22, 2021).

⁴⁸ MUR 7812 Compl. at 3 (citing AFP Fact Check, *About Us*, <https://factcheck.afp.com/fact-checking-afp>).

Fact Check blog is a 2017 addition to AFP’s work product, AFP asserts that “[f]act-checking has been a core element of AFP’s work as a global news agency for more than 180 years.”⁴⁹

III. LEGAL ANALYSIS

A. The Commission Finds No Reason to Believe that Facebook Made, or the Biden Committee Knowingly Accepted, Prohibited or Excessive In-Kind Contributions

The Act and Commission regulations prohibit any corporation from making contributions to a candidate’s principal campaign committee.⁵⁰ Further, no person shall make contributions to any candidate, his or her authorized committee, or their agents with respect to any election for federal office which, in the aggregate, exceed \$2,800 during the 2020 election cycle.⁵¹

A “[c]ontribution” is defined to include any gift of money or “anything of value” for the purpose of influencing a federal election.⁵² The Commission has previously concluded that a commercial vendor providing services to political committees does not make a contribution for the purpose of influencing an election when its business activity “reflects commercial considerations and does not reflect considerations outside the business relationship.”⁵³ A commercial vendor need not make its services available to committees representing all political ideologies, but rather may establish objective business criteria to protect commercial viability of its business without making contributions to the committees that meet those criteria.⁵⁴

⁴⁹ *Id.*

⁵⁰ 52 U.S.C. § 30118(a).

⁵¹ *Id.* § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1).

⁵² 52 U.S.C. § 30101(8)(A); 11 C.F.R. §§ 100.52(a), 100.111(a). “Expenditure” is likewise defined to include “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(9).

⁵³ Advisory Op. 2012-31 (AT&T) at 4.

⁵⁴ Advisory Op. 2017-06 (Stein and Gottlieb) at 6; *see also* Advisory Op. 2012-28 (CTIA — The Wireless Association) at 3, 8-9 (no contribution to committee where “wireless service providers may decide, due to

1 The Commission has long considered activity engaged in for *bona fide* commercial
 2 reasons not to be “for the purpose of influencing an election,” and thus, not a contribution or
 3 expenditure under section 30118(a).⁵⁵ This is true even if a candidate benefitted from the
 4 commercial activity.⁵⁶

5 Under Commission regulations, expenditures that are coordinated with a candidate, but
 6 are neither a coordinated communication nor a party coordinated communication are in-kind
 7 contributions to that candidate.⁵⁷ Coordinated means “means made in cooperation, consultation
 8 or concert with, or at the request or suggestion of, a candidate, a candidate's authorized
 9 committee, or a political party committee.”⁵⁸

commercial considerations, to accept proposals from some political committees and not others”); Advisory Op. 2012-26 (Cooper for Congress, *et al.*) at 10 (no contribution to committee where its participation was subject to “objective and commercially reasonable” criteria); Advisory Op. 2004-06 (Meetup) at 1 (explaining that a corporation may provide goods and services to political committees without being considered to have made an in-kind contribution so long as it does so “on the same terms and conditions available to all similarly situated persons in the general public”).

⁵⁵ See, e.g., Factual & Legal Analysis at 4, MUR 6586 (World Wrestling Entertainment, Inc.) (finding that the WWE acted with the “sole intent to defend its business reputation” and not for the purpose of influencing an election when the WWE’s senior vice president sent a letter to a newspaper seeking a retraction of a negative article about Senate candidate Linda McMahon, who owned and served as CEO of the WWE); First Gen. Counsel’s Rpt. at 13, MUR 5474 (Dog Eat Dog Films, *et al.*) (determining that distributors and marketers of *Fahrenheit 9/11* film did so “in connection with bona fide commercial activity and not for the purpose of influencing an election”) (Commission voted to approve no reason to believe recommendations); Advisory Op. 2018-11 (Microsoft Corp.) at 4 (concluding that commercially reasonable efforts “to protect [Microsoft’s] brand reputation” by providing election-sensitive customers with free account security services are not an in-kind contribution).

⁵⁶ See Cert. ¶ 5, MUR 3622 (The Clinton/Gore ‘92 Committee) (approving no reason to believe recommendation) (June 6, 1994); First Gen. Counsel’s Rpt. at 16, MUR 3622 (The Clinton/Gore ‘92 Committee) (“[T]he fact that any of these candidates . . . may have received an indirect benefit (dissemination of their political positions) as a result of the sale of these tapes does not convert commercial activity into a corporate contribution.”); Factual & Legal Analysis at 6, MUR 7024 (Van Hollen for Senate, *et al.*) (opining that the “question under the Act is whether the legal services were provided for the purpose of influencing a federal election, not whether they provided a benefit to Van Hollen’s campaign,” and concluding there was no contribution given the “absence of any objective or subjective indication” respondents acted for the purpose of influencing the election).

⁵⁷ 11 C.F.R. § 109.20(b).

⁵⁸ *Id.* § 109.20(a).

1 As explained below, the record before the Commission does not provide a reasonable
2 basis to conclude Facebook’s alleged actions undertaken in connection with its fact-checking
3 program were made for the purpose of influencing a federal election. Neither the Complaint nor
4 other available information indicate that Facebook’s application of its fact-checking program, as
5 alleged, was motivated by something other than a commercial interest.

6 As an initial matter, Facebook’s actions appear consistent with its general fact-checking
7 program and its asserted commercial purposes. As described above, Facebook apparently
8 identified the Edwards, Malone, and Liberty Counsel Articles as potentially containing
9 misinformation; its fact-checking partners assessed the articles, determined that they were
10 “false,” and appended fact-check articles to explain why the articles were considered
11 misinformation.⁵⁹ As for Facebook’s reduction of the distribution of posts containing the link to
12 the *New York Post* article, Facebook states that it similarly identified the article as potentially
13 containing misinformation within the meaning of its fact-checking policies, and limited
14 dissemination of the article on its platform while it conducted a fact-check.⁶⁰ Facebook states
15 that it has assessed that misinformation “is bad for our community and bad for our business,” and
16 that it implemented fact-checking procedures “to combat misinformation on its platform for
17 independent business reasons,” not “for the purpose of influencing any election for Federal
18 office.”⁶¹

⁵⁹ See MUR 7812 Compl. at 2-3; MUR 7825 Compl. at 2-3.

⁶⁰ See *supra* notes 27-28 and accompanying text.

⁶¹ MUR 7812 Facebook Resp. at 2; MUR 7825 Facebook Resp. at 2; MUR 7869 Facebook Resp. at 1-2; see *Hard Questions: How Is Facebook’s Fact-Checking Program Working?*, FACEBOOK NEWSROOM (June 14, 2018), <https://newsroom.fb.com/news/2018/06/hard-questions-fact-checking/>.

1 The Complaints argue that Facebook’s purpose was electoral, based on an alleged
2 imbalance in political contributions made by individual Facebook employees in their personal
3 capacities to Republican and Democratic campaigns generally, as well as allegations of bias
4 underlying Facebook’s policy decisions governing content selected for fact-checking and
5 reduced distribution.⁶² However, a disparity in contributions by Facebook employees may
6 reflect the partisan leanings of these employees in their personal capacities, but it does not
7 indicate that the purpose of Facebook’s operations was electoral. Accordingly, without more,
8 these statements are of limited value and do not provide indication of the underlying purpose of
9 Facebook’s fact-checking program generally, or specifically regarding the purpose of its actions
10 that are the subject of the Complaints.⁶³

11 Further, the premise that Facebook has undertaken its fact-checking program for the
12 purpose of influencing an election should be considered in the context of the scope of the overall
13 program. Facebook states that the political subjects of posts that have been fact-checked “span
14 the political spectrum,” and it submits several examples of negative statements about Trump,
15 Biden’s opponent, that were fact-checked in the same fashion as the negative articles about
16 Biden and Harris at issue here.⁶⁴ And, in one instance, relating to the Malone Article, Facebook
17 apparently reviewed and reversed its determination that the article was false and restored the

⁶² *See supra* pp. 8-9.

⁶³ This conclusion also applies to the Complainant in MUR 7812’s allegation that his post was deleted, and his account was disabled. Neither the Complaint nor other available information indicate that Facebook’s actions were motivated by an electoral interest rather than applying its Community Standards “in order to ensure the integrity of the user experience on its platform.” MUR 7812 Facebook Resp. at 2 n.3.

⁶⁴ *See supra* note 44; *cf.* AFP Resp. at 2 n.7 (noting AFP’s fact-checking posts “debunking false claims about Donald Trump, his family, and the Trump campaign”).

1 ability of users to post the article without any fact-check labeling.⁶⁵ Such a decision would
2 conflict with, not support, the alleged purpose of supporting Biden/Harris's election. On the
3 other hand, restoring the Malone Article to normal treatment once it was determined not to be
4 misinformation is consistent with Facebook's asserted purposes and policies. Facebook also
5 states that it applies these same fact-checking policies to various subjects unrelated to elections,
6 such as misinformation surrounding public health issues including COVID-19, and false
7 statements about other public figures,⁶⁶ adding credibility to Facebook's position that
8 misinformation about candidates is one type of misinformation it is seeking to address for
9 business reasons. In sum, the information concerning the scope and structure of the Facebook's
10 fact-checking program provides credible support to Facebook's asserted commercial motivation.

11 In addition, there is no indication that Facebook coordinated its activities with Biden or
12 his campaign. Though the Complainant in MUR 7812 acknowledges that he "know[s] of no
13 direct evidence" of coordination, he provides what he describes as circumstantial evidence in the
14 form of: (1) the hiring of Facebook Director and Associate General Counsel Jessica Hertz by the
15 Biden Transition team;⁶⁷ (2) a disparity between the amount of contributions Facebook
16 employees have made in past elections to Democrats compared to Republicans;⁶⁸ and (3) the
17 Biden campaign's alleged highly critical treatment of Facebook, which the Complainant asserts
18 was a "cover for coordination."⁶⁹ The MUR 7869 Complaint similarly points to the hiring of

⁶⁵ MUR 7812 Compl. at 17

⁶⁶ *Supra* p. 10.

⁶⁷ MUR 7812 Compl. at 20-21.

⁶⁸ *Id.* at 18.

⁶⁹ *Id.* at 20-21.

Hertz, as well as Biden’s Innovation Policy Committee including “at least eight people who work for Facebook, Amazon, Google and Apple.”⁷⁰ But none of this information provides a reasonable basis to infer that the Biden Committee coordinated with Facebook regarding the specific activities alleged in the Complaint.

In light of the above, the available information indicates that the actions taken by Facebook to fact-check and reduce the distribution of potential misinformation appear to reflect commercial considerations, rather than an effort to influence a federal election. Moreover, there is no basis to reasonably conclude that Facebook coordinated its activities with the Biden Committee. Therefore, the Commission finds no reason to believe that Facebook violated 52 U.S.C. §§ 30116(a) or 30118(a) by making a prohibited or excessive in-kind contribution to the Biden Committee and find no reason to believe that the Biden Committee violated 52 U.S.C. §§ 30116(f) or 30118(a) by knowingly accepting or receiving such a contribution.

B. The Commission Finds No Reason to Believe that Facebook Made Unreported Independent Expenditures Supporting the Biden Committee

In the alternative to the allegation that Facebook’s activities resulted in Facebook making in-kind contributions to the Biden Committee, the Complaint in MUR 7812 alleges that Facebook “was conducting an Independent Expenditure in support of Kamala Harris for Vice President by removing anti-Harris posts or posting favorable articles about candidate Harris.”⁷¹

An “independent expenditure” is an expenditure “for a communication expressly advocating the election or defeat of a clearly identified candidate” that is not coordinated with

⁷⁰ See also MUR 7869 Compl. at 2-3 (internal citation omitted). *But see* MUR 7869 Biden Committee Resp. at 1-2 (noting that the Innovation Policy Committee included over 700 members and was a “volunteer group advising the Committee”).

⁷¹ MUR 7812 Compl. at 22.

the candidate or the candidate’s committee.⁷² The term “expressly advocating” means any communication that: (1) uses phrases or words such as “vote for,” “elect,” “defeat,” etc., “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)”; or (2) “[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s).”⁷³

Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year shall file a statement with the Commission.⁷⁴ The Act further requires that all “public communications” by a person that expressly advocates the election or defeat of a federal candidate must contain appropriate disclaimers.⁷⁵

The only communication discussed in the MUR 7812 Complaint is the AFP fact-checking article. While the Complaint disputes the accuracy and fairness of the AFP fact-checking article in comparison to the Edwards Article, it does not point to any instance of the AFP fact-checking article expressly advocating for Harris (or Biden).⁷⁶ Instead, the AFP fact-

⁷² 11 C.F.R. § 100.16(a) (definition of independent expenditure); *see also* 52 U.S.C. § 30101(17) (same).

⁷³ 11 C.F.R. § 100.22(a)-(b).

⁷⁴ 52 U.S.C. § 30104(c)(1); *see also* 11 C.F.R. § 114.10(b) (independent expenditure reporting requirements for corporations and labor organizations).

⁷⁵ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2). “Public communications” include “general public political advertising,” which includes communications over the Internet when those communications are “placed for a fee on another person’s Web site.” 11 C.F.R. § 100.26.

⁷⁶ *See* MUR 7812 Compl. at 5-8; Ian Timberlake, *Kamala Harris does not oppose gun ownership or the Second Amendment*, AFP FACT CHECK (Aug. 28, 2020), <https://factcheck.afp.com/kamala-harris-does-not-oppose-gun-ownership-or-second-amendment>.

checking article discusses Harris’s positions and statements regarding gun ownership, gun violence, and Second Amendment rights generally.

Absent express advocacy, the AFP fact-checking article does not constitute an independent expenditure. Accordingly, the Commission finds no reason to believe that Facebook violated 52 U.S.C. § 30104(c)(1) by failing to report independent expenditures, or 52 U.S.C. § 30120(a) by failing to provide required disclaimers on independent expenditures.

C. The Commission Finds No Reason to Believe that AFP Made a Prohibited Foreign National Contribution

MUR 7812 alleges that AFP, a fact-checking partner of Facebook, made prohibited in-kind foreign national contributions to the Biden Committee, by publishing the fact-check article that was appended to the Edwards Article.⁷⁷ The Act and Commission regulations prohibit any “foreign national” from directly or indirectly making a contribution or donation of money or other thing of value, or an expenditure, independent expenditure, or disbursement, in connection with a federal, state, or local election.⁷⁸

At the outset, the Complaint does not allege and there is no information to suggest that AFP acted in coordination with the Biden Committee, and thus there is no basis to conclude that a contribution resulted from AFP’s activities. Moreover, there is no information to suggest that AFP acted with the purpose of influencing the election of Biden, Harris, or any other candidate. Rather, AFP asserts that its activities are part of its journalistic efforts “to seek[] the truth by

⁷⁷ MUR 7812 Compl. at 22-23.

⁷⁸ 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f). Courts have upheld the provisions of the Act prohibiting foreign national contributions and independent expenditures on the ground that the government “has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.” *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff’d* 132 S. Ct. 1087 (2012); see *United States v. Singh*, 924 F.3d 1030, 1041–44 (9th Cir. 2019).

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questioning sources and verifying the facts.”⁷⁹ Further supporting AFP’s assertion that its purpose was journalistic and not supporting Biden’s or Harris’s election, AFP identifies numerous articles on the AFP Fact-Check Blog that “debunked false claims about Donald Trump, his family, and the Trump campaign.”⁸⁰

Accordingly, the Commission finds no reason to believe that AFP violated 52 U.S.C. § 30121 by making prohibited foreign national contributions to the Biden Committee.

⁷⁹ AFP Resp. at 2; *see also id.* at 1 (stating that “its mission is to provide accurate, balanced, and impartial coverage of news wherever and whenever it happens in the world”).

⁸⁰ *Id.* at 2 (citing W.G. Dunlop, *Altered Image of Hitler Used to Criticize Trump*, AFP FACT CHECK, (June 3, 2020), <https://factcheck.afp.com/altered-image-hitler-used-criticize-trump>; *Photo of 2018 Swiss Music Festival Falsely Shared as Florida Trump Rally*, AFP FACT CHECK (Oct. 19, 2020), <https://factcheck.afp.com/photo-2018-swiss-music-festival-falsely-shared-florida-trump-rally>; Ian Timberlake, *Video Misleadingly Edited to Make Trump Appear Disoriented*, AFP FACT CHECK (Sept. 9, 2020), <https://factcheck.afp.com/video-misleadingly-edited-make-trump-appear-disoriented>; Louis Baudoin-Laarman, *Melania Trump Targeted with False Claims on White House Rose Garden Redesign*, AFP FACT CHECK (Aug. 28, 2020), <https://factcheck.afp.com/melania-trump-targeted-false-claims-white-house-rose-garden-redesign>).